UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROYAL INSURANCE COMPANY OF AMERICA,

Plaintiff,

-against- : No. 3:01CV1317 (GLG)

OPINION

ZYGO CORPORATION,

Defendant.

Royal Insurance Company of America ("Royal") has brought this action under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaration that it has no obligation to indemnify its insured, Zygo Corporation ("Zygo"), under a marine open cargo insurance policy ("Policy") for losses sustained by Zygo in connection with the shipment of certain cargo to Taiwan. Pursuant to Rule 56, Fed. R. Civ. P., Royal now moves for summary judgment **[Doc. # 111]** on the ground that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. For the reasons set forth below, the motion for summary judgment will be denied.

Factual Background

The relevant background facts, taken from Royal's Local Rule 56(a)1 Statement, have been admitted by Zygo and are, therefore, undisputed. On May 1, 1999, Zygo, through a broker, procured from Royal a marine open cargo insurance policy, Policy

No. POC102950. Coverage commenced on that date and was in place during the events giving rise to this lawsuit.

In January 2000, Zygo sold an atomic force microscope ("the microscope") to Nan Ya Technologies ("Nan Ya"), a corporation located in Taipei, Taiwan, for $690,000. Nan Ya was to pay Zygo in full for the microscope upon its arrival in Taiwan. Delivery terms were "F.O.B. [Free on Board] U.S. Airport," the effect of which was to transfer title to Nan Ya once the microscope was loaded onto the transport aircraft in the United States. Zygo was not required to insure the microscope on its carriage from the United States to Taiwan. Zygo contracted with Lynden Air Freight ("Lynden") on behalf of Nan Ya to deliver the microscope from the United States to Taiwan via airplane. On February 4, 2000, after the microscope was loaded onto the aircraft at a United States airport, Lynden issued a clean air waybill to Zygo, certifying that the microscope was in good order with no apparent defects, problems or damage. Somewhere in transit from the airport in the United States to Taiwan, where it was inspected by Nan Ya, the microscope was severely damaged. Nan Ya thereafter refused to pay Zygo for any part of the microscope's $690,000 purchase price. On March 7, 2000, Zygo submitted a claim for the loss of the microscope to its insurer, Royal. In July 2001, Royal formally declined coverage for the damaged microscope and commenced the instant declaratory

judgment action. Citing Clause 52 of the Policy, and asserting that Zygo had attempted without success to "collect the amount due on the [microscope]," Zygo, by way of a counterclaim, sued Royal for breach of contract and sought a declaration from this Court that its claim is covered under the Policy. Royal then filed the instant motion for summary judgment.

Summary Judgment Standard

The standard for granting a motion for summary judgment is well-established. A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of establishing that there is no genuine factual dispute rests with the moving party. See Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). In ruling on a motion for summary judgment, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In an action involving contract interpretation, summary judgment is appropriate only when the terms of the contract are

wholly unambiguous. Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975). Contractual language is unambiguous if it has "'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'" Hunt Ltd. v. Lifschultz Fast Freight, Inc., 889 F.2d 1274, 1277 (2d Cir. 1989) (alteration in original) (quoting Breed v. Ins. Co. of N. Am., 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282 (1978)). Language does not become ambiguous solely because the parties offer conflicting interpretations during the course of litigation. See Wards Co. v. Stamford Ridgeway Assocs., 761 F.2d 117, 120 (2d Cir. 1985) (stating that "[c]ontorted semanticism must not be permitted to create an issue where none exists"); see also Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983).

If the contractual language is ambiguous and subject to varying reasonable interpretations, the issue of the parties' intent is a question of fact, thereby rendering summary judgment inappropriate. Thompson v. Gjivoje, 896 F.2d 716, 721 (2d Cir. 1990). In that event, the parties have a right to present extrinsic evidence to aid in the interpretation of the contract whose provisions are not wholly unambiguous. Asheville Mica Co. v. Commodity Credit Corp., 335 F.2d 768, 770 (2d Cir. 1964); see

also Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 230 (2d Cir. 1995) (holding that summary judgment based upon the construction of a contract is appropriate only if the meaning of the language is clear, considering all the surrounding circumstances and undisputed evidence of intent, and there is no genuine issue as to the inferences that might reasonably be drawn from the language). Thus, if the moving party cannot establish unambiguous contract language, "a material issue exists concerning the parties' intent, and the non-moving party has a right to present extrinsic evidence regarding the meaning of the contested term." Wards Co., 761 F.2d at 120.

Choice of Law

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1333, which provides federal district courts with original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." Federal admiralty jurisdiction extends to cases involving marine insurance contracts. See Advani Enters., Inc. v. Underwriters at Lloyds, 140 F.3d 157, 161 (2d Cir. 1998). "Absent a specific federal rule, federal courts look to state law for principles governing maritime insurance policies . . . and apply federal maritime choice of law rules to determine which state's law to apply." Commercial Union Ins. Co. v. Flagship Marine Servs., Inc., 190 F.3d 26, 30 (2d Cir. 1999). There is no specific federal rule governing construction of

maritime insurance contracts, and thus we turn to state law for this purpose. See Wilburn Boat Co. v. Fireman's Fund Insur. Co., 348 U.S. 310, 321 (1955). "Under federal choice-of-law rules, we determine which state law to use by 'ascertaining and valuing points of contact between the transaction [giving rise to the cause of action] and the states or governments whose competing laws are involved.'" Advani, 140 F.3d at 162 (alteration in original) (quoting Lauritzen v. Larsen, 345 U.S. 571, 582 (1953)). Here, because the Policy was executed, delivered, and issued in Connecticut to Zygo, a Connecticut corporation, we conclude that Connecticut law governs our interpretation of the Policy.

Rules of Construction of an Insurance Contract

The parties do not disagree on the rules that apply to the construction of the insurance contract in this case. In Connecticut, it is well-established that "the terms of an insurance policy are to be construed according to the general rules of contract construction. . . . The determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . ."

Schilberg Integrated Metals Corp. v. Cont'l Cas. Co., 263 Conn. 245, 267-68, 819 A.2d 773, 789 (2003) (citations and internal

quotation marks omitted) (alterations in original). Where the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. If, however, the words of the policy are susceptible of two equally responsible interpretations, the Court must adopt that interpretation that will sustain the claim and cover the loss. Heyman Associates No. 1 v. Ins. Co. of Pennsylvania, 231 Conn. 756, 769-70, 653 A.2d 122 (1995). "Our jurisprudence makes clear, however, that [a]lthough ambiguities are to be construed against the insurer, when the language is plain, no such construction is to be applied. . . . Indeed, courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." Heyman Assocs., 231 Conn. at 770-71, 653 A.2d 122.

"In construing the document, we look at the [policy] as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable result." Israel v. State Farm Mut. Auto Ins. Co., 259 Conn. 503, 509, 789 A.2d 974, 977 (2002) (citations and internal quotation marks omitted) (alterations in original). We note further that generally, "the determination of what the parties intended to encompass in their contractual commitments

is a question of the intention of the parties, and an inference of fact." Bead Chain Mfg. Co. v. Saxton Prods., Inc., 183 Conn. 266, 274-75, 439 A.2d 314, 319 (1981). But, when there is definitive contract language with no ambiguity, "the determination of what the parties intended by their contractual commitments is a question of law." Thompson & Peck, Inc. v. Harbor Marine Contracting Corp., 203 Conn. 123, 131, 523 A.2d 1266, 1270 (1987); see also Mycak v. Honeywell, Inc., 953 F.2d 798, 802 (2d Cir. 1992); Rothenberg v. Lincoln Farm Camp., Inc., 755 F.2d 1017, 1019 (2d Cir. 1985); Mulligan v. Rioux, 229 Conn. 716, 740-41, 643 A.2d 1226, 1239 (1994).

When examining the parties' intent, the Court must look to the intent expressed in the contractual language and not to any intention that may have existed in the parties' minds. Gateway Co. v. DiNoia, 232 Conn. 223, 231-32, 654 A.2d 342, 347 (1995); see also Water and Way Properties v. Colt's Mfg. Co., 230 Conn. 660, 666, 646 A.2d 143, 145-46 (1994). The parties' intent can be determined by examining the language used, interpreted in light of the parties' situation and circumstances surrounding the transaction. Ives v. City of Willimantic, 121 Conn. 408, 411, 185 A. 427, 428 (1936); see also Barnard v. Barnard, 214 Conn. 99, 109-10, 570 A.2d 690, 696 (1990).

In the case of a disputed insurance policy, we must determine "whether, reading the policy from the perspective of a

reasonable layperson in the position of the purchaser of the policy, the policy is ambiguous." Israel, 259 Conn. at 509, 789 A.2d at 977. The alleged ambiguity "should be construed from the standpoint of the reasonable layperson in the position of the insured and not according to the interpretation of trained underwriters." Ceci v. National Indemnity Co., 225 Conn. 165, 174, 622 A.2d 545, 550 (1993). Ambiguities in an insurance contract are resolved against the party responsible for its drafting, and the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view. Israel, 259 Conn. at 508, 789 A.2d at 977. This canon, commonly referred to as “contra proferentem,” is more rigorously applied in the context of insurance contracts than in other contracts. Hansen v. Ohio Cas. Ins. Co., 239 Conn. 537, 545-46, 687 A.2d 1262 (1996).

Discussion

Both parties agree that there are no disputed factual issues. Therefore, the question before the Court is whether the Royal, as the moving party, has carried its burden of proving that the relevant provisions of the Policy are unambiguous with respect to non-coverage for the damaged cargo, such that Royal is entitled to summary judgment as a matter of law.

A. Contingency or Unpaid Vendor's Coverage

1. The Parties' Contentions

Royal does not dispute that the type of cargo involved in this litigation, an atomic force microscope, falls within the definition of "new electro-optical measuring equipment" under Clause 3 of the Policy.[1] Clause 3, however, excludes from coverage any goods sold by Zygo where, under the terms of sale, Zygo was not obligated to furnish ocean marine insurance. In this case, it is undisputed that Zygo was not obligated to furnish ocean marine insurance under the terms of the sale with Nan Ya for the subject cargo.

Nevertheless, as Royal concedes, shipments so excluded under Clause 3 can qualify for limited coverage under Clause

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[1] Clause 3 of the Policy reads in relevant part as follows:

> 3. PROPERTY INSURED & INSURABLE INTEREST
>
> This Policy covers, for account of whom it may concern, shipments of lawful goods and merchandise consisting principally of:
>
> > New electro-optical measuring components, parts and related equipment in approved export packaging.
>
> Under or on deck, consigned to or shipped by others for account or control of Assured or in which the Assured has the risk of loss, but excluding shipments either sold or purchased by the Assured subject to the terms of sale (or purchase) whereby the Assured is not obligated to furnish Ocean Marine insurance.

(Policy ¶ 3) (emphasis added).

55's exception for F.O.B. shipments. Clause 55 extends the Policy's coverage to shipments sold by Zygo F.O.B., where Zygo was not obligated to furnish ocean marine insurance, but only until such time as "the goods are loaded on board the overseas vessel or until the Assured's interest ceases, whichever shall first occur." (Policy ¶ 55.) Relying on that latter provision of Clause 55, Royal argues that its coverage for this F.O.B. cargo terminated once the cargo was loaded on board the overseas aircraft. This explicit termination of all Policy coverage, Royal asserts, is "clear, unambiguous, and absolute – leaving no room for exceptions." (Royal's Mem. at 7.) Because the damage to the cargo occurred after loading, Royal contends that it has no obligation to provide coverage for the loss.

Zygo, on the other hand, relies on the unpaid vendor's coverage provided by Clause 52 (entitled "Contingency" and also referred to as "unpaid vendor's coverage"). Clause 52 provides that

> on all shipments sold by [Zygo] on cost and freight or other terms whereby [Zygo] is not required to furnish ocean marine insurance, this Policy is <u>extended (subject to all its terms and conditions) to cover only the interest of [Zygo] as an unpaid vendor from the time shipments become at the risk of the customer under the terms of sale until payment of draft but in no event beyond the time when [Royal's] risk would normally cease under the terms of this Policy</u>.

(Policy ¶ 52)(emphasis added). Zygo asserts that "[r]ather than

being 'primary' coverage, affording protection where Zygo bears the risk of loss under the terms of sale, [this contingency coverage] is 'secondary' or 'backup' coverage, which becomes operative after the risk of loss has shifted to Zygo's customers." (Zygo's Mem. at 7.) Thus, it maintains that once the cargo was placed on board the aircraft and the risk of loss passed to Nan Ya, at that point the contingency coverage under Clause 52 commenced because the shipment became "at the risk of the customer under the terms of sale." Since Zygo was never paid for the damaged microscope, it maintains that, as an unpaid vendor, it was covered under the terms of Clause 52.

Royal disagrees, relying on the last phrase of Clause 52, which limits this coverage to the "time when [its] risk would normally cease under the terms of this Policy." It asserts that its risk would normally cease when the cargo was loaded aboard the aircraft and, thus, there is no coverage under this Clause.

Zygo responds that to adopt Royal's interpretation would render the entire Clause meaningless, extending no back-up coverage whatsoever. It argues that it contracted with Royal for unpaid vendor's coverage so that in the event its customers did not pay for shipped cargo, Royal would "advance the amount of such loss pending collection from the buyer." (Policy ¶ 52.) Clause 52 recites that the Policy is "extended" to cover Zygo's interest as an unpaid vendor "from the time shipments become at

the risk of the customer . . . until payment of draft." (Id.)(emphasis added). Yet, according to Royal's interpretation, there was no extension of coverage beyond the time when its risk would normally cease under the other terms of the Policy. Zygo argues that to adopt this reasoning would render the "extension" of coverage a nullity. This interpretation, Zygo urges, cannot be what the parties bargained for, nor could such an interpretation be objectively reasonable.

Royal replies that, contrary to Zygo's contention, Royal's interpretation of Clause 52 does not render it meaningless, for it would still apply to domestic shipments. Royal bases this argument on Coverage Section II of the Policy, "Domestic Transportation Insurance," which extends coverage to domestic shipments. It asserts that since domestic shipments are never loaded on board overseas vessels (or aircraft), coverage of domestic shipments would not be affected by Clause 55's termination of coverage once F.O.B. goods are loaded on overseas vessels (or aircraft).

Zygo responds to this argument by pointing out that Clause 52 is located in Coverage Section I of the Policy that pertains to "Ocean Cargo," not Coverage Section II that concerns "Domestic Transportation Insurance." It asserts that the Policy should be read as a whole from the layman's perspective to determine the intent of the parties, and that the Court should

give operative effect to all provisions of the Policy, if possible.

2. Are the Policy provisions unambiguous with respect to the termination of coverage once the cargo was loaded aboard the overseas aircraft or may Zygo invoke the unpaid vendor's coverage under the Contingency Clause?

In describing the purpose of contingency coverage in a marine cargo policy, the Second Circuit has stated that "[c]ontingency coverage would make [one set of] underwriters liable if [another set of] underwriters failed to pay on their primary coverage." Armada Supply Inc. v. Wright, 858 F.2d 842, 847 (2d Cir. 1988). According to Zygo, the unpaid vendor's coverage in the Policy was designed to cover just the type of contingency that occurred here -- when the customer does not pay, even though it contracted for the goods and assumed the risk of loss, under the contingency clause, the insurer would be obligated to pay the insured the sales price up to the coverage amount. However, according to Royal, all insurance coverage under the Policy terminated once the microscope was loaded aboard the overseas aircraft and the risk of loss passed to the customer. Yet, to adopt this interpretation, as Zygo argues, would render the contingency coverage a nullity, which does not appear to be a reasonable interpretation of what the parties intended. The difficulty with Zygo's position, however, is its inability to offer a persuasive explanation for the meaning of

the last phrase in Clause 52 on which Royal relies: "but in no event beyond the time when [Royal's] risk would normally cease." Zygo suggests that this could be interpreted to refer to the general limitations in the rest of the Policy, such as termination of all coverage under the Policy by either party. It is not clear to the Court that this is what the parties intended by this phrase. At the same time, it is clear that this contingency coverage was intended to provide some form of extended coverage beyond what was otherwise provided in other coverage sections of the Policy.

"When interpreting a contract, [the Court] must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." Indus. Risk Insurers v. Hartford Steam Boiler Inspection & Ins. Co., 258 Conn. 101, 118, 779 A.2d 737, 748 (2001) (internal quotation marks omitted); see also O'Brien v. U.S. Fid. & Guar. Co., 235 Conn. 837, 843, 669 A.2d 1221, 1224 (1996); Hansen v. Ohio Cas. Ins. Co., 239 Conn. 537, 545, 687 A.2d 1262, 1266 (1996). Additionally, the Court should avoid a construction that renders certain provisions meaningless. The Connecticut Court of Appeals, in Enfield Pizza Palace, Inc. v. Ins. Co. of Greater N.Y., 59 Conn. App. 69, 75, 755 A.2d 931, 935 (2000), noted its reluctance "to conclude that a contractual provision constitutes

a meaningless gesture by the parties." As we noted above, the determinative question is the intent of the parties – that is, what coverage Zygo expected to receive and what coverage Royal intended to provide, as disclosed by the Policy provisions. See Schilberg Integrated Metals Corp., 263 Conn. at 267-68, 819 A.2d at 789.

The burden here is on Royal to prove that the Policy unambiguously established that coverage was to terminate once the cargo was loaded onto an overseas aircraft – in other words, that this termination was absolute and not extended by the contingent, unpaid vendor's coverage. When the Policy is read as a whole, we find that it is ambiguous as to the operative effect of Clause 52, the contingent, unpaid vendor's coverage. It is not at all clear that this "extension" of coverage applied only to only domestic cargos, as Royal contends. There is nothing in the language of Clause 52 that limits its application to domestic shipments. Moreover, Clause 52 is located within Coverage Section I of the Policy entitled "Ocean Cargo," not Coverage Section II entitled "Domestic Transportation Insurance." Furthermore, Clause 5 of Coverage Section I, entitled "Geographic Limits," excludes shipments between the 48 contiguous states of the United States, as well as Canada. Although coverage under the Policy was extended to domestic shipments by the addition of Coverage Section II, absent that

section, Clause 52 would be meaningless if Royal's interpretation were adopted. Thus, it is somewhat of an oxymoron to assume that the contingency coverage of Clause 52 in Section I was intended to apply only to domestic shipments when domestic shipments were expressly excluded under Section I.

Accordingly, we hold that Royal has failed to offer a reasonable interpretation of the extension of coverage provided by Clause 52. By the same token, Zygo has failed to offer an adequate explanation of the limiting language in Clause 52 that "in no event" would coverage be extended beyond the time then Royal's risk would normally cease under the terms of the Policy. And, as discussed below, we are further troubled by the requirement of Clause 52 that Zygo declare and pay additional premiums on the property insured thereunder. To the extent the Zygo was required to pay additional premiums for this "extended" coverage, the parties must have intended that it was paying for something of value. But, what extended coverage was provided, if any, and under what circumstances that coverage could be invoked is not clear from the Policy.

Therefore, with respect to Royal's argument that there was no coverage under the Contingency Clause once the cargo was loaded aboard the overseas aircraft, the Court finds that Royal has failed to carry its burden of establishing that the Policy is unambiguous, subject to only one reasonable interpretation.

These ambiguities cannot be resolved on summary judgment.

B. Zygo's Failure to Pay Additional Premiums for the Contingency Coverage

1. The Parties' Contentions

Royal asserts, in the alternative, that even if the contingency coverage continued after loading and applied to non-domestic shipments, this contingency coverage never went into effect because Zygo failed to declare the cargo and pay an additional premium. Royal relies on the last paragraph of Clause 52, which provides: "The Assured agrees to declare to this Company the value of all shipments covered under the terms of this endorsement and to pay premium thereon at rates to be agreed." (Policy ¶ 52.) Royal claims that this language clearly required Zygo to declare the microscope separately and to pay an additional premium for this special contingency coverage, which it did not do.

Zygo admits that it did not separately declare the microscope or pay an extra premium, but claims that under the payment terms of the Policy it was not required to do so. Under the Policy, Zygo paid its premiums and declared its shipments yearly, with the premiums determined as a percentage of Zygo's gross sales from the prior year. It asserts that it complied with this declaration requirement when it declared to Royal its gross income at the end of the Policy year. Premiums were then

computed based upon Zygo's gross sales. Zygo claims that the language of Clause 52 did not establish payment and declaration requirements other than what it had already been doing on a yearly basis.

Additionally, Zygo points to similar language throughout the Policy -- Clause 10 ("Accumulation" coverage, which applies to accumulation of the property insured beyond Policy limits, only when an "additional premium [is] paid if required"); Clause 15 ("Containerization, Consolidation, Deconsolidation" coverage, which generally applies to Property located on carriers for the purpose of consolidation, beyond 30 days, where "additional premium [is] paid if required by the Company"); Clause 21 ("Warehouse-to-Warehouse" coverage for certain transshipments, which applies "at a premium to be arranged"); Clause 22(E) ("Marine Extension" Clause, which provides coverage "at a premium to be arranged in case of change of voyage or of any . . . error in the description of the interest vessel or voyage"); Clause 24 ("Deviation" Clause, which provides coverage for deviations in the course of transit where an "additional premium [is] paid if requested"); Clause 54 ("Difference in Conditions" Clause, stating that the Assured agrees to "pay premium thereon at rates to be agreed"); Clause 55 ("FOB/FAS Shipments" clause, which provides an extension of risk coverage beyond 30 days "at rates to be agreed"); and Clause 56 ("Return Shipments" Clause,

in which the Assured agrees to "pay premium, if required, at rates to be agreed") – and argues that if Royal was reserving its right to decline coverage every time the Policy referred to premiums to be paid at agreed-upon rates, a substantial portion of the Policy's coverage would be negated. Zygo labels this a "pattern of deception." Royal refers to it as establishing a "logically consistent pattern of providing for added premiums for added coverage." (Royal Reply Mem. at 4.) At the very least, Zygo argues, from the perspective of a layperson in the position of the insured, this language is ambiguous and misleading. Additionally, Zygo points out that Royal's position that coverage under the contingency clause contemplates the payment of a separate premium is inconsistent with its position that contingency coverage was terminated at the time that its risk under the Policy would normally cease. "If Zygo must pay extra for contingency coverage, presumably it would be paying for something – and not the nullity that Royal interprets the contingency clause to be," asserts Zygo. (Zygo's Mem. at 12.)

2. Whether Zygo's failure to declare and pay additional premiums renders the unpaid vendor's coverage void?

The body of "Coverage Section I" of the Policy, which contains Clauses 3, 52, and 55, does not discuss the amount of premiums to be paid or the manner of computing them. Instead, in Endorsement No. 3, the Policy provides for an Annual Marine

Deposit Premium of $18,000, payable in quarterly installments. It further requires Zygo to furnish Royal with an annual report of gross sales for the Policy year within 30 days of the anniversary of the Policy, from which Royal would then calculate the premium thereon at the rate of .023 per $100 of total gross sales. The earned premium in excess of the deposit was then due and payable immediately. (Endorsement No. 3 – Annual Marine Deposit Premium.) The Policy also contains a "Schedule of Rates," which, consistent with Endorsement No. 3, sets forth a rate of .023 per 100 dollars of gross sales for "new electro-optical components, parts, and related equipment in approved export packing" to or from places in the World for shipment by vessel or air. (Schedule of Rates ¶ 3.) The Schedule of Rates also lists other rates for other types of coverage or indicates if rates were to be agreed upon. For example, the Schedule of Rates provides:

> 4. Duty, if covered, at one-third of the above marine rates.
> 5. On-Deck shipments at rates to be agreed.
> . . .
> 9. Risks of War and Strikes, Riots and Civil Commotions, if covered, at the rates current on date of Shipment.
> 10. Domestic Transit, if covered, at rate(s) shown in Section II, Clause 9.B.[2]
> 11. Warehouse Storage, if covered, at rates specified in Section III, Schedule of

[2] Section II, Clause 9, provided that the rate per $100 was "included" with reports to be made annually.

Approved Locations.[3]
12. Processing, if covered, at rates specified in the Schedule of Approved Processing Locations.[4]

The final paragraph of the Schedule of Rates, on which Royal relies, provides "[o]ther property, vessels or voyages not provided for herein, at rates to be agreed. . . ." (Schedule of Rates ¶ 13.) Royal asserts that this paragraph should be read to mean that additional coverage could be added to the Policy, provided rates were agreed upon and paid outside of the Schedule of Rates. It could also be read, as Zygo suggests, to apply only to other "property, vessels or voyages," as opposed to other risks or types of coverage, such as contingency, unpaid vendor's coverage on property already covered by the Schedule of Rates.

It appears from the Policy's Schedule of Rates that rates were in fact agreed upon for domestic transit, warehouse storage, processing, risks of war and strikes, as set forth in the various sections of the Policy and in attached schedules, although for the most part, these rates were already included in the base rate. (Schedule of Rates ¶¶ 9-12.) There is no mention, however, in the Schedule of Rates or anywhere else of

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[3] These rates were included. (Schedule of Approved Warehouse Locations.)

[4] These rates were included. (Schedule of Approved Processing Locations.)

the rates to be charged for accumulation, containerization, warehouse-to-warehouse, deviation, difference in conditions, return shipments, or contingency (unpaid vendor) coverage. There also is no reference in the Schedule of Rates to these coverages at rates to be agreed upon, as there is for On-Deck shipments. (See Schedule of Rates ¶ 5.) It is not at all clear to the Court, and neither party offers an explanation, as to why these coverages were omitted entirely from the Schedule of Rates. Additionally, whether Zygo ever invoked any of these coverages with or without the payment of additional premiums is a matter on which there is no evidence in the record.

The Court is confronted with opposing interpretations of a critical Policy provision concerning the payment of additional premiums for extended coverage, without any evidentiary support for either position. Additionally, from a practical standpoint, it is unclear at what point Zygo was required to make these declarations or pay the premiums. Royal offers no reasonable explanation as to how the declaration and payment of additional premiums were intended to operate.

Here again, Royal has the burden of proving that the Policy unambiguously attaches additional requirements for unpaid vendor's coverage under Clause 52 and that the premiums and declarations were not in fact covered under the general provisions of the Policy. Royal has not met its burden with

respect to this claim. The Court finds that when the Policy is considered as a whole from the perspective of a layperson, as the insured, it is ambiguous as to whether and when additional declarations had to be made and additional premiums paid for contingency coverage under Clause 52.

Conclusion

Accordingly, for the foregoing reasons, the Motion for Summary Judgment of Royal Insurance Company of America **[Doc. # 111]** is DENIED.

SO ORDERED.

Date: August 15, 2003.
Waterbury, Connecticut.

_____/s/_____
GERARD L. GOETTEL
United States District Judge